It turns upon the character of the act involved when the Exchange enters into a listing contract. It may not follow by any means that such a step in itself amounts to the exercise of a statutory power even though most clearly it is the exercise of a statutory function.

The second point concerns the exercise by the Exchange of the power of suspension. That was, it was said, the exercise of a right given by the contract and thus was clearly outside the scope of the exercise of any power under the statute; at best it could be described as one step removed from the exercise of a statutory power; and it is only that latter action which is the subject of challenge in these proceedings."

In *Regina* v. *National Coal Board, ex parte National Union of Mineworkers and Others,*(11) representatives of four unions involved in the mining of coal sought judicial review of the National Coal Board's decision to close a colliery. It was argued on behalf of the Board that that was not a case amenable to judicial review since it did not involve public law. What Macpherson J. said at p. 795 is instructive. He said that whilst the Board may have duties and powers given by statute and is for some purpose regarded as a public body it is not in any way empowered by statute to make a decision which is subject of the attack nor was the decision in any way part of its activities as a public body which can be reviewed. Macpherson J. then continued:

"Of course it has public interest. Of course it deals with public money. Of course it concerns the unions and their members. But it is not, in my judgment, a decision in the field of public law ...".

In the instant case, ministerial control is only in respect of policy matters and not the day to day administration and business of the Exchange. The relationship between the parties who are members of the Exchange is clearly contractual and the exercise of the power of the KLCE under regulation 11 of the General Regulations is also an exercise of a power derived under the contract. The act which is the subject of the challenge is, by its nature, not and should not in our view be made amenable to judicial review.

Because of our conclusion on the basic issue, we do not think it would be proper for us to deal with or form any conclusion on the arguments on the two grounds raised by the appellants.

The appeal is accordingly dismissed with costs. Deposit to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Zain & Co.; Shook Lin & Bok.*

PERMODALAN MBF SDN. BHD. v. TAN SRI DATUK SERI HAMZAH BIN ABU SAMAH & ORS.

[S.C (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) July 17 & November 2, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 497 of 1986]

Civil Procedure – Injunction – Ex parte injunction – Application to set aside – Whether injunction can be suspended – R.H.C. 1980 O.29 r.1, O.32 r.6 & O.92 r. 4.

The appellants had on November 20, 1986 obtained an *ex parte* interim injunction before Zakaria Yatim J. to restrain the 11th respondent, Emtex Corporation Berhad, and its directors, the 1st to 8th respondents, from functioning or performing any of the duties of directors or officers of the company and to refrain from completing and proceeding with the sale and purchase of the shares of the 9th respondent by the 11th respondent from the 10th respondent. The said injunction also appointed four new directors named therein to carry out the functions and duties of the board of directors and of the 11th respondent until after the trial of the action. The former directors and officers of the company were directed to hand over forthwith all correspondence, books of accounts and other relevant documents belonging to the 11th respondent to the four new directors who were required to prepare and lodge with the Senior Assistant Registrar monthly reports of and concerning the affairs of the 11th respondent. The respondents or any of them were at liberty to apply to set aside or vary the court order upon summons *inter partes* served on the appellant or its solicitors not later than fourteen clear days from the return date of such *inter partes* summons. The respondents accordingly applied to have the injunction set aside but an early date could not be fixed for the hearing. On November 22, 1986, two days after the interim injunction, the respondent obtained an *ex parte* order before Zakaria Yatim J. in chambers restraining the appellant whether by itself or its servants or agents from entering the premises of the 11th respondent until the trial of the action or until the disposal of the application to set aside the order dated November 20, 1986. As an early date could not be fixed for the hearing to set aside the order, the respondents applied by summons in chambers to have the effect of the orders stayed pending the hearing of the application to set it aside. Zakaria Yatim J. heard the application but fell ill in the course of the hearing. V.C George J. then took over and heard the application. The learned judge made an order suspending the effect of all the orders made on November 20, 1986, except for the first part which restrained the 11th respondent, whether by itself or by its servants or agents, from completing, implementing or proceeding with the sale and purchase of the shares of the 9th respondent from the 10th respondent until after the trial of the action. The appellants appealed.

Held: (1) an application for an injunction under Order 29 rule 1(1) R.H.C. 1980 has to be heard *inter partes*, thus enabling either the plaintiff or the defendant to apply. On the other hand, an *ex parte* application under sub-rule (2) may be made by the plaintiff only and in a case of urgency;

(2) it seems therefore that in this case the defendants cannot apply for an interim injunction *ex parte* but may do so *inter partes* under Order 29 rule 1(1) R.H.C 1980. The injunction dated November 22, 1986, should not therefore have been granted;

(3) the most obvious remedy available in this case was the application to set aside the interim injunction of November 20, 1986, which ought to have been heard early in lieu of the application to suspend the injunction. In the circumstances of the case, it was not necessary for the application to be heard by the same judge who granted the injunction and another judge could hear it;

(4) there was no necessity at all for the order to suspend the injunction pending the hearing of the application to set it aside. The appeal must therefore be allowed.

Cases referred to:

(1) *London Permanent Benefit Building Society* v. *de Baer* [1969] 1 Ch. 321 at 332.
(2) *Polini* v. *Gray* (1879) 12 Ch. D. 438.
(3) *Erinford Properties Ltd.* v. *Cheshire County Council* [1974] 2 All E.R. 448.
(4) *Shelfer* v. *City of London Electric Lighting Company* [1895] 2 Ch. 388.

SUPREME COURT.

Sri Ram for the appellant.

Wong Weng Kai (*Miss Chuah Mei Lin* with him) for respondents 1, 2, 6, 7, 8 and 11.

K. B Thuraisingham for respondents 3, 4 and 5.

S. Achan for respondents 9 and 10.

Syed Agil Barakbah S.C.J. (delivering the judgment of the court): We allowed this appeal on July 17, 1987, with the order that each party bear its own costs and promised to give our reasons later. We do so now.

The appeal arose from the decision of V.C. George J. in the High Court, Kuala Lumpur who held that the High Court has jurisdiction to suspend the effect of an *ex parte* interim injunction granted on November 20, 1986, pending the hearing of an application to have it set aside before Zakaria Yatim J. The said injunction at the instance of the plaintiff/appellant restrained Emtex Corporation Berhad (the 11th respondent) and its directors, *viz.* the 1st to the 8th respondents respectively, from functioning or performing any of the duties of directors or officers of the company and to refrain from completing and proceeding with the sale and purchase of shares of the 9th respondent by the 11th respondent from the 10th respondent. It also appointed four new directors named therein to carry out the functions and duties of the board of directors and of the 11th respondent until after the trial of the action. The former directors and the officers of the company were directed to hand over forthwith all correspondence, books of accounts and other relevant documents belonging to the 11th respondent to the four new directors who were required to prepare and lodge with the S.A.R. monthly reports of and concerning the affairs of the 11th respondent. The respondents or any of them were at liberty to apply to set aside or vary the court order upon summons *inter partes* served on the plaintiff/appellant or its solicitors not later than fourteen clear days from the return date of such *inter partes* summons. The respondents accordingly applied to have the injunction set aside but an early date could not be fixed for hearing until the second half of January 1987. Because of that, the respondents by summons-in-chambers dated November 25, 1986 applied to have the effect of the orders made by Zakaria Yatim J. be stayed pending the hearing of the application to set it aside. The learned judge heard the application at short notice but fell ill in the course of hearing it. V.C. George J. took over and heard the said application. What counsel for the respondents wanted, as noted by the learned judge, was "to suspend the effect of the injunction pending hearing of the application to set aside which they hoped would be heard by Justice Dr. Zakaria Yatim in January".

On November 22, 1986, two days after the order of interim injunction, the respondents obtained an *ex parte* order before the same judge in chambers restraining the plaintiff/appellant, whether by itself or its servants or agents, from entering the premises of the 11th respondent until the trial of the action or until the disposal of the application to set aside the order dated November 20, 1986.

There appeared to be two conflicting orders of injunction and the impression that V.C. George J. had in perusing the documents before him was that the order dated November 22, 1986 tended to water down the effect of the order of November 20, 1986. In assessing the real position, he continued:

"In the event, going by the documents before me, it seems to me the situation obtaining is most unsatisfactory. On the one hand, you have the original Board of Directors restrained from functioning as directors or officers of the company. On the other hand, you have the 4 new directors appointed by the court to take over and run the company. Yet there is the situation that they may not enter into the premises of the company. At best the whole situation is shrouded in uncertainty."

He then made an order suspending the effect of all the orders made on November 20, 1986, except for the first part which restrained the 11th respondent, whether by itself or by its servants or agents, from completing, implementing or proceeding with the sale and purchase of shares of the 9th respondent from the 10th respondent until after the trial of the action. As a result, the effect of all the orders was thereby lifted thus enabling the former directors to function and perform their duties without having to hand over all the correspondence, books of accounts and other relevant documents belonging to the 11th respondent to the four new directors whose appointment as such by the former order was also suspended. The only restraint that was not lifted by the suspension was the refraining of the sale and purchase of shares as stated earlier and which, in our view, was the main issue in dispute between the parties.

We would like to express our view on the issue of the *ex parte* injunction at the instance of the respondents or the defendants in the court below which was granted by the judge on November 22, 1986. Although Order 29 rule 1(1) R.H.C. 1980 enables any party to apply for an injunction either before or after trial of an action, Order 29 rule 1(2) thereof allows the plaintiff to apply for an *ex parte* injunction by summons supported by an affidavit, but only in the case of urgency. No such provision was included in the former Supreme Court Rules 1957 dealing with the same matter under Order 50. Order 29 is therefore a new provision introduced in the R.H.C. which superseded the R.S.C. 1957 by repeal as provided under Order 93 rule 1(a) of the former since June 1, 1980. In our opinion, an application for injunction under Order 29 rule 1(1) has to be heard *inter partes* thus enabling either the plaintiff or the defendant to apply "whether or not a claim for injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be". On the other hand, an *ex parte* application under sub-rule (2) may be made by the plaintiff and only in a case of urgency. Inter-party hearing appears to be the rule while an *ex parte* application for injunction appears to be the exception in the circumstances provided by sub-rules (2) and (3) and is to be allowed only in cases of urgency on the application of the plaintiff. Sub-rule (3) enables such application to be made before the issue of any writ or originating summons so long as the case is one of urgency. The court is empowered to grant an injunction on such terms as the issue of a writ or summons or as it thinks fit. It seems therefore that the defendants cannot apply for an interim injunction *ex parte* but may do so *inter partes* under rule 1(1). In our considered judgment, the injunction dated November 22, 1986 should not have been granted.

Turning to the main issue, the learned judge, in granting the order suspending the *ex parte* injunction, applied the principle based on English authorities. He quoted a passage by Plowman J. in *London Permanent Benefit Building Society* v. *de Baer*[1] from the judgment of Cotton L.J. in *Polini* v. *Gray*.[2] The principle, *inter alia*, says that where there is a reasonable ground of appeal and if not making the order to stay execution of the decree would render the appeal nugatory, *i.e.* it would deprive the appellant, if successful, of the result of the appeal, then it becomes the duty of the court to interfere and suspend the right of the successful party. That, in the view of Cotton L.J., applied equally to the case where action has been dismissed and to the case where a decree has been made establishing the plaintiff's title. He also cited *Erinford Properties Ltd.* v. *Cheshire County Council*[3] where Megarry J. applied the dictum in *Polini* v. *Gray*[2] and held that a judge who dismissed an interlocutory motion for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against such dismissal in order to prevent the Court of Appeal's decision from being rendered nugatory should it reverse the judge's decision.

By applying the principle, the learned judge in the instant case concluded by way of implication that the court has power to suspend the effect of the *ex parte* interlocutory injunction granted on November 20, 1986, pending the hearing of the application to set it aside. With respect, we do not agree. We do not consider it to be applicable to the instant case. In the first place, the authorities cited relate to cases where there were appeals pending against the judgment or order of the court below. In other words, the aggrieved party was exercising his right of appeal. Secondly, the discretionary power of the court in granting stay of execution of the order appealed against is as provided by the rules of court. Order 55 rule 12 R.H.C. 1980 states that an appeal shall not operate as a stay of execution under the decision appealed against except in so far as the court appealed from or the High Court may order. There are other rules which provide discretionary powers to the High Court to stay the execution of its judgment or order on the ground of matters occurring since the date of judgment or order as in Order 45 rule 11 R.H.C. and to stay execution by writ of seizure and sale as in

Order 47 rule 1 R.H.C. However, no such rule is provided in the R.H.C. enabling the High Court to exercise its discretionary power to grant suspension or stay of execution of an interim injunction pending the disposal of the application to set it aside. Has the court any jurisdiction to exercise its inherent powers in the instant case? Order 92 rule 4 R.H.C. provides:

> "4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court."

We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. The most obvious remedy available in this case was the application to set aside the interim injunction which ought to have been heard early in lieu of the application to suspend the injunction. That is because an *ex parte* injunction is usually required immediately and such application will not be granted unless it is made by the plaintiff promptly. In normal practice, an early date is fixed for the inter-party hearing for the purpose of injunction until the trial of the action. Similarly, the court should be prompt in exercising its discretionary power to set aside an order made *ex parte* under Order 32 rule 6 R.H.C. Delay would defeat the real purpose of the rule.

We are further of the opinion that it was not necessary in the circumstances of the case for the application to be heard by the same judge who granted the injunction. Another judge could hear it. There was no necessity at all for the order to suspend the injunction pending the hearing of the application to set it aside because it was tantamount to setting aside the injunction before the actual application is heard and might render a situation in which the court would have to exercise its inherent powers to interfere in order to prevent an abuse of its process.

The learned judge also cited *Shelfer* v. *City of London Electric Lighting Company*[4] where on appeal the Court of Appeal granted an injunction but suspended its operation for a certain time. Another application for further suspension was rejected by the judge but the Court of Appeal held that the application might be made to and disposed of by the judge to whose court the action was attached.

Here again, it should be noted that the case went on appeal against the decision of the judge and the suspension of the operation of the injunction was allowed, first, pending appeal and, later, pending compliance to do works in order to abate the nuisance complained of. It is not clear whether the Court of Appeal was exercising its inherent power or acted under any rules of court. However, in so far as our position is concerned, section 44 of the Courts of Judicature Act 1964 provides similar powers:

> "(1) In any proceeding pending before the Supreme Court, any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a judge of the Supreme Court.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Supreme Court.
>
> (3) Every order so made may be discharged or varied by the full Court."

This case, in our view, has no bearing on the present case to justify reliance by the learned judge. These are our grounds for allowing the appeal.

Appeal allowed.

Solicitors: *Tan & Tang; Weng Kwai & Zaid; Clough Thuraisingham & Co.; Tengku Mohd. Achan & Lim.*